SINGAPORE REPORTS

BULSING LTD. v. JOON SENG & CO.

[O.C.J. (Chua J.) September 29, 1971]

[Singapore — Suit No. 1859 of 1968]

Sale of Goods — Contract to sell and deliver urea — Breach of — Measure of damages — Penalty clause.

Contract — Breach of — Measure of damages.

Evidence — Parole evidence — Admissibility of, when written document exists — Evidence Act (Cap. 5, 1970 Ed.), s. 92.

The plaintiff's claim against the defendant was for damages suffered by the plaintiff by the failure of the defendant to observe the terms and conditions of a written contract dated March 12, 1968, entered into between the plaintiff and the defendant.

The following facts were not in dispute. It was agreed between the plaintiff and the defendant that the plaintiff should sell and deliver to the defendant, and the defendant should buy and accept from the plaintiff, 50,000 metric tons of urea at US.$69.00 per metric ton. It was a condition of the contract that payment should be made by way of letters of credit opened in favour of the plaintiff on various specified dates. The defendant failed to open the letters of credit on the due dates.

The defendant admitted entering into the contract but contended that it was not entering into it as principal but as broker or agent, of which it was alleged the plaintiff knew, and that therefore the action did not lie against the defendant because it was merely acting as a broker or agent for a known principal.

Counsel for the plaintiff submitted that the defendant had entered into the contract as principal and that no extrinsic evidence could be adduced by the defendant to show that it was acting as agent.

In order to fulfil the contract with the defendant, the plaintiff entered into a contract dated March 10, 1968, to purchase 50,000 metric tons of urea at U.S.$66 per metric ton from Chimimport of Bulgaria. When the plaintiff failed to establish the necessary letter of credit, Chimimport claimed damages for non-fulfilment of the contract and finally settled for agreed damages of U.S.$33,000, being 1% of the amount of the contract. Under the penalty clause, the plaintiff had to pay 2% of the total amount of the contract to Chimimport.

The damages claimed by the plaintiff were for the sum of Singapore $549,000 based on the loss of profit (U.S.$150,000) plus damages (U.S.$33,000) which it had to pay to the supplier. However, the defendant contended that damages in this case were limited to the amount set out in the penalty clause.

Thus one issue, *inter alia*, to be determined was the measure of damages to be awarded in this case.

Held: (1) the defendant appeared, on the face of the contract, to have been personally a contracting party and it must therefore be held to have entered into the contract as principal and it could not adduce evidence to show that it was acting as agent, by virtue of section 92 of the Evidence Act (Cap. 5);

(2) the general rule in the case of breach of contract is that the plaintiff, by way of damages, is entitled to be put in the same position as he would have been in if the contract had been completed. In this case, there was no available market for the urea. Therefore, the plaintiff was entitled to the loss of profit as well as to recover from the defendant the damages which the plaintiff had to pay to Chimimport;

(3) where the stipulated sum does not compensate for the actual loss suffered, the plaintiff has an election of either suing on the penalty clause in which case he cannot recover more than the stipulated sum, or he may sue for breach of contract and recover damages in full.

Cases referred to:-

(1) *Jones* v. *Littledale* 112 E.R. 186.

(2) *Magee* v. *Atkinson* 150 E.R. 830.

(3) *Higgins* v. *Senior* 151 E.R. 1278.

(4) *Basma* v. *Weekes* [1950] A.C. 441, 451.

(5) *In re Vic Mill, Ltd.* [1913] 1 Ch. 183; affirmed by Court of Appeal in [1913] 1 Ch. 465.

(6) *Thompson (W.L.) Ltd.* v. *Robinson (Gunmakers) Ltd.* [1955] Ch. 177.

(7) *Public Works Commissioner* v. *Hills* [1906] A.C. 368, 375.

(8) *Wall* v. *Rederiaktibolaget & Luggude* [1915] 3 K.B. 66.

(9) *Watts, Watts & Co. Ltd.* v. *Mitsui Co. Ltd.* [1917] A.C. 227.

SUIT.

Lim Chor Pee and *Thio Su Mien* for the plaintiff.

G. S. Hill and *Wu Tchi Chu* for the defendant.

Cur. Adv. Vult.

Chua J.: The plaintiff's claim against the defendant is for damages suffered by the plaintiff by the failure of the defendant to observe the terms and conditions of the contract dated 12th March, 1968, entered into between the plaintiff and the defendant.

The following facts are not in dispute. By a contract in writing dated 12th March, 1968, it was agreed between the plaintiff and the defendant that the plaintiff should sell and deliver to the defendant and the defendant should buy and accept from the plaintiff 50,000 metric tons of urea at the purchase price of US$69.00 per metric ton. It was a condition of the contract that payment should be made by way of letters of credit opened in favour of the plaintiff on 20th May, 20th June, 20th July, 20th August and 20th September, 1968. The contract was signed:

"Buyer:

Joon Seng & Co.	Bulsing Limited
Sd. Lim Joon Howe	Sd. B. Olovanov
Sole Proprietor.	SINGAPORE.

WITNESS:
Sd. A. M. Datuk.

The defendant failed to open the letters of credit on the due dates.

It is the plaintiff's case that the written agreement on 12th March, 1968, constituted the whole contract between the parties and that the defendant was purchasing from the plaintiff as the buyer.

The defendant admits that it entered into the contract with the plaintiff but it contends that it was not entering into the contract as principal but as broker or agent, as the plaintiff well knew —

"the intention being to give effect to an agreement for the sale of urea by the plaintiff to the Indonesian Government or alternatively to an agency approved by the Indonesian Government on its behalf at a price of US$69.00 per metric ton on terms that the defendant would receive a commission of US$6.00 per metric ton sold from the plaintiff."

The defendant, therefore, maintains that this action does not lie against it because it was merely acting as a broker or agent for a known principal.

Counsel for the plaintiff submits that the defendant had entered into the contract as principal and that no

extrinsic evidence can be adduced by the defendant to show that it was acting as agent. I am of the view that this submission is correct.

Section 92 of the Evidence Act (Cap. 5) provides that where there is a written contract, parol evidence is not admissible to contradict, vary, add to or subtract from the terms contained in the written contract.

In *Jones* v. *Littledale*,[1] Littledale & Co., brokers at Liverpool, sold hemp by auction at their room, and gave an invoice describing the goods as "bought of J. & H. Littledale" and received part of the price, but failed to deliver the goods; an action having been brought against them by the purchaser for the non-delivery and for money had and received, it was held that Littledale & Co. had made themselves responsible as sellers by the invoice and could not defend themselves by evidence tending to show that they sold as agents and had intimated that fact before and at the time of the sale. Lord Denman C.J. in delivering the judgment of the court said (at p. 188): —

"There is no doubt that evidence is admissible, on behalf of one of the contracting parties, to show that the other was agent only, though contracting in his own name, and so to fix the real principal; but it is clear that, if the agent contracts in such a form as to make himself personally responsible, he cannot afterwards, whether his principal were or were not known at the time of the contract, relieve himself from that responsibility."

In *Magee* v. *Atkinson*,[2] the learned judge who tried the case told the jury that if the defendant (a broker in Liverpool) entered into a written contract in his own name, he could not afterwards set up that he was acting as broker merely; and that, although known to be a broker, if he signed the contract in his own name, he was liable. At the trial evidence was tendered to show that the custom of Liverpool was to send in broker's notes without disclosing the principal's name but this evidence was rejected. The defendant moved for a new trial on the ground of misdirection and of the rejection of evidence. The direction to the jury was held to be a proper one and Parke B. said:

"I do not see any default in the rejection of evidence, because the object of the evidence tendered was to alter the written contract."

In *Higgins* v. *Senior*,[3] there was a written agreement, purporting on the face of it to be made by the defendant and subscribed by him for the sale and delivery by him of goods above the value of $10, but the defendant sought to avoid the liability by proving that the agreement was really made by him by the the authority of, and as agent for, a third person, and that the plaintiff knew those facts at the time the agreement was made and signed. It was held that this did not enable the defendant to escape liability. Parke, B. in delivering the judgment of the court, stated the principle as follows (at page 1282):

"There is no doubt, that where such an agreement is made, it is competent to shew that one or both of the contracting parties were agents for other persons, and acted as such agents in making the contract, so as to give the benefit of the contract on the one hand to (*Garrett* v. *Handley*, 4 B. & Cr. 664; *Bateman* v. *Phillips*, 15 East, 272) and charge with liability on the other (*Paterson* v. *Gandasequi*, 15 East, 62), the unnamed principals: and this, whether the agreement be or be not required to be in writing by the Statute of Frauds: and this evidence in no way contradicts the written agreement. It does not deny that it is binding on those whom, on the face of it, it purports to bind; but shews that it also binds another, by reason that the act of the agent, in signing the agreement, in pursuance of his authority, is in law the act of the principal.

But, on the other hand, to allow evidence to be given that the party who appears on the face of the instrument to be personally a contracting party, is not such, would be to allow parol evidence to contradict the written agreement; which cannot be done .... It is true that the case of *Jones* v. *Littledale*[1] might be supported on the ground that the agent really intended to contract as principal; but Lord Denman, in delivering the judgment of the court, lays down this as a general proposition, 'that if the agent contracts in such a form as to make himself personally responsible, he cannot afterwards, whether his principal were or were not known at the time of the contract, relieve himself from that responsibility.' And this is also laid down in *Story* on Agency, section 269. *Magee* v. *Atkinson*[2] is a direct authority, and cannot be distinguished from this case."

The principle stated by Parke, B. was cited with approval by the House of Lords in *Basma* v. *Weekes*,[4] *per* Lord Reid, (at page 451). In that case the appellant claimed for specific performance of an agreement by which the first three respondents had agreed to sell to him two houses, of which they were tenants-in-common. The respondents pleaded, *inter alia*, that the agreement alleged was not a sufficient memorandum to comply with the requirements of the Statute of Frauds in that the purchaser named therein was acting, to the knowledge of the respondents, as agents for the appellant, who was the principal, and that the agreement did not identify the appellant as purchaser. It was held that an agent who contracted in his own name did not cease to be contractually bound because it was proved that the other party knew when the contract was made that he was acting as agent. So the agreement which was made in his name did not cease in that event to contain the names of the contracting parties and therefore did not cease to satisfy the Statute of Frauds; and accordingly that, as the agent would have sued on the contract, so could his principal, the appellant.

It is clear that in this case the defendant appears on the face of the contract to be personally a contracting party and it must, therefore, be held to have entered into the contract as principal and it cannot adduce evidence to show that it was acting as agent.

That finding makes it strictly unnecessary for me to deal with the evidence adduced by the defendant. But I have considered the evidence and I need only set out my findings.

I find that A.M. Datuk of National Development Corporation of Jakarta was not an agent of the Indonesian Government and that there is no truth in the allegation of the defendant that there was an oral agreement for the sale of urea by the plaintiff to the Indonesian Government and that the written contract of 12th March was to give effect to that oral agreement. Lim Joon Howe in his evidence did not say that he signed the contract to give effect to the alleged oral agreement. Whose agent was the defendant? This I am unable to discover from the evidence. I find that in fact it was the defendant who was the buyer of the urea. I think the true position is that the defendant entered into the contract hoping to

sell the urea at a profit to the Indonesian Government through A.M. Datuk but unfortunately for the defendant that hope did not materialise.

The damages claimed by the plaintiff are for the sum of Singapore $549,000.00 based on the loss of profit (US$150,000.00) plus damages (US$33,000.00) which it had to pay to the supplier.

In order to fulfil the contract with the defendant the plaintiff entered into a contract dated 10th March, 1968, to purchase 50,000 metric tons of urea at the price of US$66 per metric ton from Chimimport of Bulgaria. According to H.I. Boichev of Chimimport, who gave evidence, Chimimport obtained the urea from the manufacturers and the goods were prepared to be exported. When the plaintiff failed to establish the necessary letters of credit, Chimimport made a claim for damages against the plaintiff for non-fulfilment of the contract, and after negotiations the amount of damages agreed upon was US$33,000 being 1% of the amount of the contract. Under the penalty clause in the contract the defaulting party was liable to pay 2%. This sum was paid by the plaintiff to Chimimport.

The question is the measure of damages which should be awarded in this case.

The defendant submits (1) that the normal measure of damages is the contract price less the market price at the contractual time for acceptance and this represents the amount the seller must obtain to put himself in the position he would have been in had the contract been carried out, since he can sell the goods in the market: (*Mayne & McGregor* on Damages, 12th Ed., page 383 para. 424); (2) that the onus of proof of damage is on the plaintiff and (3) that the plaintiff has failed to prove damage.

The measure of damages for non-acceptance of goods is prescribed by section 50 of the English Sale of Goods Act, 1893, (which is law here) thus:

"(1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.

(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.

(3) Whether there is an available market for the goods in question the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept."

As I understand the arguments, the plaintiff claims that the measure of damages within the meaning of section 50 (2) of the Act is the profit which the plaintiff would have made on the sale. On the other hand, the defendant relies on section 50(3) of the Act.

In my opinion the general rule in the case of breach of contract is that the plaintiff, by way of damages, is entitled to be put in the same position as he would have been in if the contract had been completed. Subsections (2) and (3) of section 50 give the measure of general damages and the measure of damages laid down in subsection (3) is not to be applied in cases where it is not appropriate to achieve the result required by subsection (2), for example in the case where the plaintiff is a dealer in the particular goods sold. In such a case, what ensues from the breach in the usual course of things is that the plaintiff loses the profit that he would have made had the sale to that particular buyer been completed and he is entitled to be recompensated for that loss. It is no answer to say that he has sold, or may readily sell the goods to another person, for even if he has been successful the fact remains that he has profited from one sale instead of two.

In *In re Vic Mill, Limited*,[5] it was held by Neville J. that, where there is a contract for the sale of goods to be made to order by the vendor and a breach of contract by the purchaser's refusal or inability to accept the goods, the measure of damages is the profit which the vendor would have made if the contract had been carried out. The decision of Neville J. was affirmed by the Court of Appeal.

In *Thompson (W.L.) Ltd.* v. *Robinson (Gunmakers), Ltd.*[6] the defendants refused to accept delivery of a Vanguard motor-car which they had agreed to buy from the plaintiffs, dealers in new and second-hand cars, carrying on business in the East Riding of Yorkshire. The price from which no dealer was allowed to depart, was that fixed by the manufacturers. The plaintiffs mitigated their loss by persuading their supplier to take the car back. The defendants, while admitting their breach of contract, invoked section 50 of the Sale of Goods Act and contended that they were liable only for nominal damages, since the plaintiffs could have sold the car to another customer or could, as they had in fact done, return it to their supplier. On this hypothesis, the plaintiffs had suffered only trivial loss. Upjohn, J., however, rejected the contention. He said (at page 183):

"Apart altogether from authority and statute it would seem to me on the facts which I have to consider to be quite plain that the plaintiffs' loss in this case is the loss of their bargain. They have sold one 'Vanguard' less than they otherwise would. The plaintiffs, as the defendants must have known, are in business as dealers in motor-cars and make their profit in buying and selling motor-cars; what they have lost is their profit on the sale of this 'Vanguard'."

The main point in this case put by the defendant is that subsection (3) of section 50 applies because it says that there is an available market for the urea and that there had been an increase in the price of urea in the world market at the contractual time for acceptance. In my view there was no available market for the urea in the sense that the urea could freely and readily be resold in Singapore when the defendant defaulted.

In my view, therefore, the plaintiff is entitled to the loss of profit.

I am also of the view that the plaintiff is entitled to recover from the defendant the damages which the plaintiff had to pay to Chimimport. The defendant knew that the plaintiff was not the manufacturer of the urea and that the plaintiff had to purchase it from Bulgaria. It must have been in the contemplation of the parties that in the event of a breach of the contract the plaintiff would have to pay damages to the supplier in Bulgaria.

The defendant also submits that damages in this case are limited to the amount set out in the penalty clause.

The plaintiff originally claimed damages in the sum of Singapore $207,000, being 2% of the total contract price, but this claim was later amended.

The clause provides:

"If the buyer fails to establish the L/C as mentioned above and if the seller fails to deliver the goods in the above mentioned conditions the defaulting party is liable to pay 2% of the amount."

This is clearly a penalty. A penalty covers but does not assess the damage: *Public Works Commissioner* v. *Hills*.[7] Where, however, the stipulated sum does not compensate for the actual loss suffered, the plaintiff has an election. He may either sue on the penalty clause, in which case he cannot recover more than the stipulated sum; or he may sue for breach of contract and recover damages in full: *Wall* v. *Rederiaktibolaget & Luggude*,[8] approved in *Watts, Watts & Co. Ltd.* v. *Mitsui Co. Ltd.*[9]

There will therefore be judgment for the plaintiff in the sum claimed and costs.

Judgment for the plaintiff.

Solicitors: *Chor Pee & Hin Hiong; Rodyk & Davidson.*

WEE TOON LIP & 3 ORS. v. THE MINISTER FOR HOME AFFAIRS, SINGAPORE & ANOR.

[O.C.J. (Wee Chong Jin C.J.)March 25, 1972]

[Singapore — Originating Motion No. 8 of 1971]

Criminal Law and Procedure — Habeas corpus — Detention under Internal Security Act (Cap. 115, 1970 Ed.).

Constitutional law — Internal Security Act (Cap. 115, 1970 Ed.), s. 8 — Detention under — Allegation that detention was mala fides, improper and unlawful.

Internal Security — Prolonged detention — Whether bad faith a justiciable issue — Internal Security Act (Cap. 115), s. 8.

This was a joint application by four applicants for a writ of *habeas corpus*. They were detained under the Internal Security Act, (Cap. 115).

In a joint affidavit the applicants claimed that their prolonged detention of over seven years and, in particular, in the Central Police Station lock-up for several months "is most improper and constitutes the greatest abuse of the law."

In a subsequent affidavit, the applicants alleged "lack of good faith surrounding (their) prolonged detention", and at the hearing, relied on another ground that the detention was unlawful because the orders of detention made on November 20, 1967 were unlawful orders.

Held: (1) the applicants were unable to show that their lengthy period of detention or their detention at the central police station lock-up was contrary to the provisions of section 8 of the Internal Security Act;

(2) the allegation of lack of good faith surrounding their prolonged detention was not only a mere unsubstantiated allegation, but it was not clear against whom it was made. In any event, "bad faith" was not a justiciable issue in the context of the Internal Security Act;

(3) the orders of detention made on November 20, 1967 were valid and lawful orders and were in strict compliance with section 8 of the Act, therefore the application must be dismissed.

Case referred to:-

(1) *Lee Mau Seng* v. *Minister for Home Affairs, Singapore & Anor.* [1971] 2 M.L.J. 137.

MOTION.

T. T. Rajah for the applicants.

Francis T. Seow (Solicitor-General) (*Kan Ting Chiu*, Deputy Public Prosecutor, with him) for the respondents.

Cur. Adv. Vult.

Wee Chong Jin C.J.: This is a joint application by the abovenamed four applicants for a writ of *habeas corpus*. They are being detained under the Internal Security Act (Cap. 115), (hereinafter referred to as "the Act").

In a joint affidavit the applicants say they have all been detained under the Act since 1963 and that for the past few months they have been detained at the Central Police Station lock-up under abnormal and punitive conditions. They claim that their prolonged detention of over seven years and, in particular, in the Central Police Station lock-up for several months "is most improper and constitutes the greatest abuse of the law".

In a subsequent affidavit the applicants allege "lack of good faith surrounding (their) prolonged detention" and at the hearing of their application they rely on yet another ground, namely that all of them are presently being unlawfully detained because the orders of detention which purport to cover their detention are unlawful orders.

With regard to their first contention, namely improper detention and grave abuse of the law, the power to detain, the place of detention and the manner of detention are all governed by section 8 of the Act. The applicants have been unable to show that their lengthy period of detention or their detention at the Central Police Station lock-up is contrary to the provisions of section 8.

With regard to their allegation of lack of good faith surrounding their prolonged detention it is not only a mere unsubstantiated allegation but it is not clear against whom the allegation of bad faith is made. In any event "bad faith" is not a justiciable issue in the context of the Act [see *Lee Mau Seng* v. *Minister for Home Affairs, Singapore & Anor.*[1]].

The last submission made by the applicants is a technical one and arises out of four orders made by the Minister all dated 20th November 1967 in respect of the four applicants. It will be sufficient to set out the material provisions of one of these four orders and it reads thus: —

"The Internal Security Act, 1960.
(No. 18 of 1960).

Cancellation of orders under section 81(3).

I, LIM KIM SAN, Minister of Defence, hereby order the cancellation of the order(s) made by the Minister of Defence